9-14-2016

State v. Pendleton Appellant's Reply Brief Dckt. 43317

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 43317**
	)	
v.	)	**BONNEVILLE COUNTY**
	)	**NO. CR 2014-9901**
MARK HOWARD PENDLETON,	)	
	)	**REPLY BRIEF**
Defendant-Appellant.	)	
_____	)	

_____

REPLY BRIEF OF APPELLANT

_____

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

_____

HONORABLE DANE H. WATKINS JR.
District Judge

_____

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STATEMENT OF THE CASE

Nature of the Case

Mark Howard Pendleton was charged with felony possession of a controlled substance – methamphetamine, unlawful possession of a firearm, and a persistent violator sentencing enhancement. Mr. Pendleton filed a motion to suppress, which the district court denied after determining Mr. Pendleton did not have standing to challenge the search of the building where the methamphetamine and firearm at issue had been found. Following a jury trial, the jury found Mr. Pendleton guilty of possession of a controlled substance – methamphetamine. Pursuant to a plea agreement, Mr. Pendleton then agreed to plead guilty to unlawful possession of a firearm and admit to the persistent violator sentencing enhancement. Mr. Pendleton appealed, asserting the district court erred when it determined he did not have standing to challenge the search of the building.

In its Respondent's Brief, the State argued Mr. Pendleton could not establish he met his burden of showing he had standing to challenge the search of any location where evidence was actually obtained because of the lack of evidence presented at the motion to suppress hearing about the nature of the location searched, including where different items were discovered. (Resp. Br., p.8.) The State also contended the district court specifically acknowledged there was some expectation of privacy in a workplace, and found Mr. Pendleton failed to show any expectation of privacy on that basis. (Resp. Br., p.10.) The State further contended Mr. Pendleton did not establish that the items sought to be suppressed were located in a particular part of the building over which he had a reasonable expectation of privacy. (Resp. Br., p.12.)

This Reply Brief is necessary to address certain arguments by the State. Mr. Pendleton presented evidence on the type of building where the search occurred through his sworn direct testimony at the motion to suppress hearing. The district court never specifically acknowledged there was some expectation of privacy in a workplace, and based its determination on the State's legally incorrect argument that Mr. Pendleton could not have standing unless he claimed the building was his place of residence. Mr. Pendleton's testimony indicated his workplace included the entire building, and he had a reasonable expectation of privacy in the building as his workplace.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Pendleton's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court err when it determined Mr. Pendleton did not have standing to challenge the search of the building?

ARGUMENT

The District Court Erred When It Determined Mr. Pendleton Did Not Have Standing To Challenge The Search Of The Building

A. Introduction

Mr. Pendleton asserts the district court erred when it determined he did not have standing to challenge the search of the building. The district court determined Mr. Pendleton could not have standing unless he claimed the building was his place of residence. (*See* Tr., Feb. 19, 2015, p.61, Ls.14-18.) Contrary to the district court's determination, one may have standing to challenge the search of one's workplace. *E.g.*, *O'Connor v. Ortega*, 480 U.S. 709 (1987); *Mancusi v. DeForte*, 392 U.S. 364 (1968). Here, Mr. Pendleton had standing to challenge the search because he had a subjective expectation of privacy in the place searched that society is willing to recognize as reasonable. *See State v. Pruss*, 145 Idaho 623, 626 (2008).

B. Mr. Pendleton Had Standing To Challenge The Search Because He Had A Subjective Expectation Of Privacy In The Place Searched That Society Is Willing To Recognize As Reasonable

Mr. Pendleton asserts he had standing to challenge the search of the building because he had a subjective expectation of privacy in the place searched that society is willing to recognize as reasonable.

In the Respondent's Brief, the State argues Mr. Pendleton did not identify in his motion to suppress what in particular should be suppressed, nor did he present any evidence at the motion to suppress hearing on what was seized during the search, where the items were seized from, or what testimony or information resulted from the search. (*See* Resp. Br., p.6.) The State argues "[t]here was also no evidence

presented as to the scope of the search conducted or the type of building where the search occurred," but recognizes Mr. Pendleton "referred to it as a 'building' where he 'did work' and kept tools." (Resp. Br., p.6.) Mr. Pendleton made those references during his sworn direct testimony at the motion to suppress hearing. (Tr., Feb. 19, 2015, p.52, Ls.11-12, p.54, Ls.6-7, 17-18.) In other words, despite the State's argument, Mr. Pendleton presented testimony or evidence on the type of building where the search occurred. *See, e.g.*, *Black's Law Dictionary* 1514 (8th ed. 2004) (defining "testimony" as "[e]vidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition").[1]

The State further contends Mr. Pendleton's assertion "ignores the entirety of the district court's comments, particularly the comments specifically acknowledging there is 'some expectation of privacy at a workplace,' and the court's finding that [Mr.] Pendleton failed to show any expectation of privacy on that basis." (Resp. Br., p.10.) However, the State is incorrect, and omits part of the district court's comments.

The district court did not "specifically acknowledg[e] there is 'some expectation of privacy at a workplace.'" Rather, the district court stated:

> Now, there was some alluding to authority involving workplace and whether an employee has some expectation of privacy at a workplace.
>
> I'm confident that there is some authority that relates to that. I have in my own mind my own understanding as to how far that authority will go, but I can say very clearly today that, based upon the testimony that the

[1] The State also argues the preliminary hearing transcript cannot be relied upon for purposes of reviewing the district court's denial of the motion to suppress, because it was not offered as evidence at the motion to suppress hearing. (Resp. Br., p.8.) This point is well-taken. Indeed, Mr. Pendleton has not asserted on appeal the Court should consider the preliminary hearing transcript when deciding the merits of the issue presented. (*See generally* App. Br., pp.11-17.) Rather, the testimony from the preliminary hearing was cited to provide context (*see generally* App. Br., pp.1-4).

> Court has heard today, the Court can make no finding that there was any expectation of privacy established by you based upon your assertions today.

(Tr., Feb. 19, 2015, p.62, Ls.6-15.) Earlier, the district court told Mr. Pendleton with respect to the items found at the building, "[t]he Court can't make a finding that they should be suppressed without some initial standing. And if you're claiming today that this is not your place of residence, then the Court simply, as [the State] correctly pointed out, cannot proceed any further." (Tr., Feb. 19, 2015, p.61, Ls.14-18.)

At the motion to suppress hearing, the State had argued Mr. Pendleton "has definitively shown this Court he does not reside at that location. And if he doesn't reside at that location, he had no reasonable expectation of privacy at that location." (Tr., Feb. 19, 2015, p.58, Ls.5-8.) The State also argued, "I'm not aware of any case law that says you have an expectation of privacy at your workplace." (Tr., Feb. 19, 2015, p.59, Ls.21-23.)

The district court based its determination on the State's legally incorrect argument Mr. Pendleton could not have standing unless he claimed the building was his place of residence. (*See* Tr., Feb. 19, 2015, p.58, Ls.5-8, p.59, Ls.21-23, p.61, Ls.14-18.) As explored in the Appellant's Brief (App. Br., pp.14-16), the United States Supreme Court has actually held that, "[w]ithin the workplace context, this Court has recognized that employees may have a reasonable expectation of privacy against intrusions by police." *O'Connor*, 480 U.S. at 716 (citing *Mancusi*, 392 U.S. 364). The district court never specifically acknowledged there was some expectation of privacy at a workplace, but only acknowledged there was "some authority that relates to that." (*See* Tr., Feb. 19, 2015, p.62, Ls.6-15.)

On appeal, the State has omitted the part of the district court's comments expressing the district court was relying upon the State's legally incorrect argument. (*Compare* Tr., Feb. 19, 2015, p.61, Ls.15-18 ("And if you're claiming today that this is not your place of residence, then the Court simply, as [the State] correctly pointed out, cannot proceed any further."), *with* Resp. Br., p.9 ("And if you're claiming today that this is not your place of residence, then the Court simply . . . cannot proceed any further.").) The entirety of the district court's comments show the district court erred by determining Mr. Pendleton could not have standing unless he claimed the building was his place of residence.

Additionally, the State argues Mr. Pendleton did not establish "that the items sought to be suppressed were located in a particular place inside the building over which [Mr.] Pendleton had a reasonable expectation of privacy." (Resp. Br., p.12.) The State disputes the analogy drawn between the office in *Mancusi* and Mr. Pendleton's building workplace here, arguing that *Mancusi* "does not stand for the proposition that an employee has standing to challenge a search of an entire building in which he works." (Resp. Br., pp.11-12.) While *Mancusi* involved an office as opposed to an entire building, *see Mancusi*, 392 U.S. at 369, the analogy drawn by Mr. Pendleton does not break down based on that factual difference.

The State has neglected to mention that the United States Supreme Court has delineated the boundaries of the workplace context: "The workplace includes those areas and items that are related to work and are generally within the employer's control. At a hospital, for example, the hallways, cafeteria, offices, desks, and file cabinets, among other areas, are all part of the workplace." *O'Connor*, 480 U.S. at 715-16. The

O'Connor Court held, "[w]ithin the workplace context, this Court has recognized that employees may have a reasonable expectation of privacy against intrusions by police." *Id.* at 716. The *O'Connor* Court also indicated whether an employee has a reasonable expectation of privacy could depend on the work environment and must be addressed based on the individual case. *See id.* at 717-18 ("Given the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.").

Thus, the boundaries of the workplace are not necessarily confined to one's office. Here, Mr. Pendleton's testimony that he cleaned the outside of the building, stored his tools inside the building, and had responsibility to secure the building (*see* Tr., Feb. 19, 2015, p.54, Ls.6-9, 18-19), suggests his workplace included the entire building because it was related to his work and generally under his employer's control. *See O'Connor*, 480 U.S. at 715-16. Mr. Pendleton therefore could reasonably have expected that he would not be disturbed in the building, as his workplace, except by personal or business invitees. *See Mancusi*, 392 U.S. at 369. Mr. Pendleton had a reasonable expectation of privacy in the building as his workplace.[2]

Because Mr. Pendleton had a subjective expectation of privacy in the place searched that society is willing to recognize as reasonable, he had a legitimate expectation of privacy or standing to challenge the search of the building. *See Pruss*,

[2] The State also contends the testimony and argument from the preliminary hearing support its conclusion Mr. Pendleton did not have a reasonable expectation of privacy. (*See* Resp. Br., pp.12-13.) However, this contention would seem to contradict the State's earlier argument that the preliminary hearing transcript "cannot be relied on for purposes of reviewing the district court's denial of [Mr.] Pendleton's suppression motion." (*See* Resp. Br., p.8.)

145 Idaho at 626. The district court therefore erred when it determined Mr. Pendleton did not have standing to challenge the search.

CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant's Brief, Mr. Pendleton respectfully requests this Court vacate his judgment of conviction, vacate the district court's order denying his motion to suppress, and remand the case to the district court for further proceedings.

DATED this 14th day of September, 2016.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of September, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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